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No. 94-1278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

F. SCHUMACHER & CO.,
Petitioner,

v.

ALVORD-POLK, INC., *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The petition for a writ of certiorari explained the strong reasons favoring review in this case: a pervasive and entrenched conflict exists among the courts of appeals; the decision below contravenes this Court's precedents; the case presents a question that recurs frequently and has immediate practical impact on the distribution of goods throughout the nation; and the case turns entirely on the legal standard employed. Respondents' brief in opposition does not undermine these compelling arguments in support of certiorari. To the contrary, respondents' contentions -- and those of amici supporting and opposing the petition -- highlight precisely why this Court's review is warranted.

1. ***Respondents seek to rewrite the opinion of the Third Circuit.*** Respondents' brief in opposition is a

total retreat from the court of appeals' holding in this case. Creative writing, however, cannot alter reality: the Third Circuit's decision turns on the inferences drawn from circumstantial evidence of pretext.

The court of appeals (in both its initial opinion and its diametrically opposed opinion on rehearing) recognized that *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), requires "something more" than dealer complaints before an antitrust conspiracy may be inferred from circumstantial evidence. The Third Circuit specified the precise items of circumstantial evidence at issue in this case. These items consisted of evidence that: (1) Schumacher received complaints from conventional retailers regarding 800 number dealers, and following the receipt of these complaints took actions to curb 800 number free riding (Pet. App. A14, A29); (2) there were "inconsistencies in and contrasts between the internal and the public explanations of the drop shipment policy" (*id.* at A32-A33); and, (3) Schumacher did not use mathematical calculations based on cost data to set the level of its drop shipment surcharge (*id.* at A33).

Respondents attempt to rewrite the opinion below in two ways. First, they contend that the Third Circuit reversed summary judgment on Count II because the record contained "direct" evidence of conspiracy. That contention is flatly contradicted by the opinion itself and by the record. It is merely an attempt to circumvent the *Monsanto* standards for circumstantial evidence by relabeling dealer complaints as "direct" evidence. *Monsanto* does not permit that result.

Second, respondents contend that dealer complaints may themselves constitute the "something more" *Monsanto* requires. In respondents' view, the decision below does not hold that circumstantial evidence of pretext is sufficient, by itself, to satisfy the requirements of *Monsanto*, because there was also evidence of dealer complaints. That contention is wholly tautological. It is also directly contrary to *Monsanto*, which held that "something more" than dealer complaints is needed to infer a conspiracy. The Third Circuit held that circumstantial evidence of pretext can constitute "something more." Respondents now seek to invert that analysis by labeling dealer complaints as the "something more" that is added to evidence of pretext. Even if respondents' revisions had merit, there would still be a clear need for this Court to resolve the conflict that exists on an important legal issue with great practical impact.

a. ***The court of appeals did not reject summary judgment because of direct evidence of conspiracy.*** Displaying a penchant for revisionism, respondents contend -- without citation -- that the case does not turn on circumstantial evidence at all because there is "independent direct evidence of a conspiracy." Br. in Opp. 6. But, the court of appeals' decision is expressly premised on the absence of any direct evidence of a conspiracy between petitioner and the National Decorating Products Association ("NDPA"). The Third Circuit spent nearly two years determining whether the circumstantial evidence was sufficient to support an inference of conspiracy; indeed, it initially held that the circumstantial evidence was ***not*** sufficient. The court of appeals would not have undertaken that inquiry had it concluded -- as

respondents suggest -- that direct evidence of conspiracy precluded summary judgment.

The Third Circuit's analysis of Count II, in both of its opinions, focused solely on the application of the rule set forth in *Monsanto, viz.*, that in order to infer a conspiracy from ambiguous circumstantial evidence, antitrust plaintiffs must present evidence that tends to exclude the possibility that the defendant was acting independently. 465 U.S. at 764; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). This analysis of circumstantial evidence would have been wholly unnecessary had the record contained any direct evidence of conspiracy. Respondents' total retreat from the stated terms of the decision below confirms the error of the legal standard employed by the Third Circuit and spotlights the need for this Court's review.

Contrary to respondents' assertion (*see e.g.*, Br. in Opp. 6, 8), the court below did not state and the record did not contain evidence that petitioner was threatened with a dealer boycott and capitulated to that threat. What respondents characterize as "direct" evidence of conspiracy amounts to nothing more than evidence of dealer complaints and actions by petitioner in response to those complaints -- the very type of ambiguous ***circumstantial*** evidence that *Monsanto* declared could not, as a matter of law, support an inference of conspiracy absent "something more." *Monsanto*, 465 U.S. at 763-764. If, as respondents assert, the Third Circuit held that evidence of Schumacher's action in response to dealer complaints constitutes "direct" evidence of conspiracy, such a holding would be so clearly at odds with *Monsanto* that this case would be a suitable candidate for summary reversal.

b. ***Respondents' circumstantial evidence amounts to nothing more than dealer complaints along with evidence supporting an inference of pretext.*** Respondents' other attempt to rewrite the decision below asserts that the record contains more than evidence of alleged pretext, it also contains evidence of complaints and Schumacher's actions in response to those complaints. Br. in Opp. 10. Respondents characterize as dealer "pressure," or "clamoring," or "urging," precisely the sort of conduct *Monsanto* denominated as dealer complaints. Contrary to respondents' restatement of the case, the Third Circuit correctly viewed these dealer complaints as ambiguous circumstantial evidence and, hence, searched for the "something more" that *Monsanto* requires. In conflict with other courts of appeals, however, the Third Circuit held that alleged pretext is sufficient to bridge the evidentiary gap left by dealer complaints.

2. ***Respondents have not refuted the existence of a conflict in the courts of appeals.*** Respondents concede that at least five other courts of appeals have held that circumstantial evidence of pretext does not tend to exclude independent action and thus cannot support an inference of antitrust conspiracy. Br. in Opp. 11-12. Respondents seek to avoid this clear conflict by verbal legerdemain. They suggest that the Third Circuit relied on more than just pretext to tend to exclude the possibility of independent action by petitioner, it also relied on dealer complaints. That formulation merely restates the conflict, it does not dispel the clear split in authority. The only evidence relied upon by the court below to support a finding of conspiracy, other than evidence of pretext, was complaint evidence -- the very type of ambiguous circumstantial evidence that *Monsanto* directs must

trigger the search for "something more." In holding that ambiguous circumstantial evidence of pretext, in combination with evidence of dealer complaints and manufacturer response, is sufficient to permit an inference of conspiracy the Third Circuit is directly in conflict with decisions of the First, Second, Fourth, Seventh, and Eighth Circuits.[1]

Nor is there any merit to respondents' contention that the need for review is diminished because several of the conflicting decisions antedate this Court's decision in *Monsanto*. The timing of those decisions does not in any way detract from the existence of a clear conflict. First, as respondents concede, more recent decisions also hold that evidence of pretext, even in combination with evidence of complaints, will not support an inference of conspiracy. *E.g., H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1016 (2d Cir. 1989). *See* Br. in Opp. 11. Second, the precedential value of the pre-*Monsanto*

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[1] Respondents contend that the First, Second, Fourth, Seventh and Eighth Circuits hold that "a pretextual reason is not, *in and of itself*" enough to support an inference of conspiracy -- thereby suggesting those cases lack the kind of dealer complaint evidence present here. Br. in Opp. 11. Respondents are incorrect. The following cases also include evidence of dealer complaints: *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 855-56 (1st Cir. 1982); *H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005 1009-10 (2d Cir. 1989); *Venture Technology, Inc. v. National Fuel Gas Co.*, 685 F.2d 41, 47 (2d Cir.), *cert. denied* 459 U.S. 1007 (1982); *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941-42 (2d Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Garment Dist. Inc. v. Belk Store Services, Inc.*, 799 F.2d 905, 907 (4th Cir. 1986), *cert. denied* 486 U.S. 1005 (1988); *Lovett v. General Motors Corp.*, 998 F.2d 575, 577 (8th Cir. 1993) *cert. denied*, 114 S. Ct. 1058 (1994). Thus, evidence of the dealer complaints in this case is not a distinguishing factor.

decisions holding that evidence of pretext cannot support an inference of conspiracy was not undermined by *Monsanto*.[2] Surely circumstantial evidence that was insufficient to support an inference of conspiracy prior to *Monsanto* remains insufficient post-*Monsanto*, as those very circuits have held.

3. ***The briefs filed in this Court highlight the pressing need for certiorari.*** Respondents' brief in opposition reifies and justifies the concern expressed in *Monsanto*. As this Court perceived, if the requirement of concerted action in Section 1 of the Sherman Act is too easily satisfied by ambiguous circumstantial evidence, then unilateral, procompetitive conduct would be discouraged. That result would be especially pernicious to consumers if the competitive lifeline of communication between manufacturer and distributor is stilled.

Under the standard advocated by respondents, the *Monsanto* threshold would be nullified; ambiguous circumstantial evidence of dealer complaints would become "direct evidence" of conspiracy. Neither the antitrust laws nor the economy can abide that result. Far from showing any reason to deny certiorari, respondents' arguments magnify the flaws in the Third Circuit's analysis. This Court's review is needed to right the course and to resolve the uncertainty that exists in the lower courts, the legal profession and the business community.

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[2] In *Monsanto*, this Court cited the Second Circuit's decision in *H.L. Moore Drug Exchange* with approval. 465 U.S. at 764.

As set forth in the amicus brief of the National Association of Manufacturers, the question presented in this case arises frequently in the distribution of goods and has broad practical significance. Indeed, the question presented in this case is so fundamental to effective antitrust enforcement that the State of Florida has taken the unusual step of filing an amicus brief at the petition stage opposing certiorari. The State's decision to file strongly substantiates the importance attached to the issue set forth in the petition.

For these reasons, and those set forth in the petition, it is clear that the existing conflict on the legality of unilateral distribution decisions by manufacturers seeking to compete in the marketplace presents a question that is significant and recurring. It plainly warrants this Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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